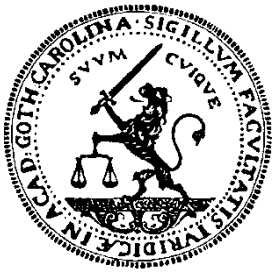

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Non-discrimination and Conditionality in Trade Preferences for Developing Countries: an analysis of the *EC-Tariff Preferences* case

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Contents

Summary

One of the current challenges within the field of international trade law is how to meet the special needs of developing countries and how to a greater extent include these countries in the world trading system. This thesis examines a particular set of exception rules that exist on behalf of developing countries. Developing countries are, in accordance with WTO law, granted different tariff preferences, often through so-called GSP programmes. When observing how developed countries design these GSP programmes, there seem to be a tendency to favour particular beneficiaries and to combine trade preferences with various conditions.

Since it is questionable whether these observed designs are consistent with WTO law, this thesis investigates; (1) the scope of the principle of non-discrimination, and (2) the limits of conditionality, in the context of trade preferences for developing countries. This study focuses on the GSP scheme of the EU and offers mainly an analysis of a well-known WTO case, the *EC-Tariff Preferences* case, which interestingly illustrates the concepts of non-discrimination and conditionality in the context of tariff preferences.

After analyzing the *EC-Tariff Preferences* case, this thesis concludes that developed countries are allowed to differentiate between developing countries as long as all similarly-situated beneficiaries are treated identically. Further, to fulfil the principle of non-discrimination, developed countries must: (1) base differentiation on needs that are related to "development, financial or trade" according to an objective standard, and (2) ascertain a sufficient nexus between the preferential treatment and the need, in order for the former to effectively improve the latter. Moreover, the limits of using conditionality are not entirely clear. However, the *EC-Tariff Preferences* case seems to indicate that conditionality in trade preferences is allowed. The conditions must nevertheless fulfil the requirements of the principle of non-discrimination. It also seems like positive conditionality has a greater chance at surviving WTO scrutiny than negative conditionality.

Sammanfattning

En av de stora utmaningarna inom den internationella handelsrätten idag är hur man ska kunna förbättra situationen för utvecklingsländer inom den internationella handeln. Denna uppsats belyser specifika undantagsregler, inom WTO-rätten, som har till ändamål att öka utvecklingsländers möjligheter att delta i den internationella handeln. Industriländer tilldelar utvecklingsländer, i enlighet med WTO-rätten, olika handelspreferenser, ofta under s.k. GSP-system. Vid en närmare anblick verkar det finnas en tendens hos industriländer att utforma sina GSP-system på sådant sätt att vissa utvecklingsländer favoriseras samt att preferenserna kombineras med olika typer av villkor.

Eftersom det är diskutabelt huruvida sådana utformningar är i enlighet med WTO-rätten, ämnar denna uppsats att reda ut: (1) omfattningen av principen för icke-diskriminering, och (2) det lagliga utrymmet för industriländer att använda konditionalitet, vad gäller handelspreferenser till utvecklingsländer. Uppsatsen har ett utpräglat fokus på EU och dess preferenssystem och bidrar huvudsakligen med en ingående analys av WTO-rättsfallet *EC-Tariff Preferences* som just behandlar uppsatsens två frågor.

Efter att ha analyserat *EC-Tariff Preferences* kan följande slutsats dras. Industriländer har möjlighet att särskilja mellan olika utvecklingsländer när de beviljar handelspreferenser, så länge alla utvecklingsländer som befinner sig i likvärdig situation behandlas lika. För att industriländer vidare ska uppfylla principen för icke-diskriminering krävs att de: (1) baserar särskiljningen mellan utvecklingsländer utifrån behov som är relaterade till ”utveckling, ekonomi eller handel” enligt en objektiv standard, samt (2) säkerställa ett tillräckligt samband mellan handelspreferenserna och behovet, som visar att det förstnämnda effektivt kan förbättra situationen i utvecklingslandet. Vad gäller konditionalitet i GSP-system är dess lagliga utrymme fortfarande något oklart. *EC-Tariff Preferences* tycks dock indikera att användandet av konditionalitet skulle vara tillåtet enligt WTO-rätten så länge principen för icke-diskriminering är uppfylld. Det verkar även som att positiv konditionalitet har större chans att överleva en WTO-granskning än negativ konditionalitet.

Abbreviations

ACP	African, Caribbean and Pacific group of states
ASEAN	Association of Southeast Asian Nations
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EBA	Everything But Arms
EC	European Community
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free-Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
ITO	International Trade Organization
LDC	Least Developed Country
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USTR	United States Trade Representative
WTO	World Trade Organization

1 Introduction

1.1 Problem

The world trading system, dominated by the World Trade Organization (WTO), is an important part of the international sphere due to continuously on-going interactions between actors around the globe. One of the major challenges for the WTO today is the question of how to include developing countries in the system in an adequate and fair way.[1] Due to the special needs of these countries, the question of how to succeed in this inclusion is not easy to answer. One of the approaches advocated by participants in the world trade system is the concept of offering developing countries special and differential treatment.[2] As a result, developed countries have often come to grant special trade preferences to developing countries in order to facilitate these countries' trade. WTO law supports the granting of such trade preferences. One of the most common ways to provide trade preferences is through Generalized Systems of Preferences (GSPs).[3]

The WTO is often described as being driven exclusively by the goal of liberalizing markets.[4] In this free trade oriented sphere, it is important to discuss the linkage between trade rules and social values. In order to improve the situation of developing countries in the world trade system, it is necessary to reflect on how the implementation of trade preferences balances the different interests of developing and developed countries. It is also interesting to look at how the diverse goals of free trade and development are balanced within these practices. The question is whether trade preferences truly contribute to the inclusion of developing countries in the world trading system and if GSP programmes are the best solution. These general reflections will function as a broader frame for this thesis.

Turning to the specific issues of trade preferences, there seem to be noticeable patterns in how developed countries design their GSP programmes. There is a tendency to offer more generous benefits to countries to which the developed country already has strong historical ties or where the trade relationship is dominated by a strong self-interest of the developed country.[5] This observation is interesting with respect to the fact that one of the most fundamental principles of WTO law is the principle of

[1] Van den Bossche, Peter (2005) *The Law and Policy of the World Trade Organization: text, cases and materials*. Cambridge: Cambridge University Press, p 694.
[2] *Consequences of the WTO-agreements for Developing Countries*, (2004) Stockholm: Kommerskollegium, p 29. See also Chapter 3.
[3] *Ibid*.
[4] See e.g. Van den Bossche, *supra* note 1, p 77-78.
[5] See e.g. Grossman, Gene M., & Sykes, Alan O., 'A Preference for Development: the law and economics of GSP' (2005) 4(1) *World Trade Review* 41-67, p 43.

non-discrimination, i.e. WTO generally prohibits discriminatory treatment between its members.[6]

Further, the GSP programmes are sometimes associated with linking trade preferences to numerous conditions set up by the developed countries.[7] These conditions are argued to be a suitable way for developed countries to influence progress in different areas of development, e.g. to increase the respect of human rights. At least, this is the argument often put forward by developed countries. Linking policy conditions to the granting of preferences can also be seen as an expression of making GSP programmes more attractive to developed countries. To what extent such conditions are allowed is debatable due to the non-reciprocal character of GSP programmes, but what is clear is that the two biggest granters of GSP benefits, the European Union (EU) and the United States (US), are using concepts of conditionality in their programmes.[8]

With regard to these observations, further examination of the practice of trade preferences and their role in the world trading system is required. More specifically, investigation is required about the permissibility of differentiating between different developing countries under the WTO law and the limits of the concept of conditionality.

1.2 Purpose and research questions

The general purpose of this thesis it to examine and analyze the scope of the principle of non-discrimination and the concept of conditionality in the context of trade preferences for developing countries. By doing this, the thesis aims to contribute to an increased knowledge about trade preferences for developing countries in WTO law, which ultimately can help facilitate the situation of developing countries in the world trading system.

To fulfil this purpose, the following research questions are important and appropriate to investigate:

- What is the scope of the non-discrimination principle in the context of tariff preferences for developing countries?
- Is the concept of conditionality in GSP programmes in conformity with WTO law? What are the limits of conditionality?

[6] Van den Bossche, *supra* note 1, p 40. See also Chapter 2.
[7] Humbert, Franziska, (2009) *The Challenge of Child Labour in International Law*. Cambridge: Cambridge University Press, p 284-285. See also Chapter 3.
[8] *Ibid*.

1.3 Scope and delimitations

In order to examine these questions, the thesis will focus on one of the biggest actors in the world trading system, i.e. the EU. This choice came naturally both because the EU is often the subject of trade discussions and because of my own personal interest in the EU.

Further focus in this thesis will be put on a well-known WTO case, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*[9]. In this case, the EU's GSP programme was scrutinized by the WTO dispute settlement system and the programme was deemed to be in violation of WTO law.[10] This case is the only one dealing with the legal questions of GSP programmes and therefore it deserves attention and analysis. Since the concepts of non-discrimination and conditionality are interestingly illustrated in the case, a comprehensive analysis of the reasoning in the case is justified with reference to my research questions.

The restricted scope of this thesis makes it necessary to make delimitations as to coverage. As previously mentioned, the thesis will mainly focus on the GSP system from an EU perspective. The US GSP system will also be introduced briefly but not discussed in any detail. It is also impossible to cover all the different issues raised by the *EC-Tariff Preferences* case. As a result, the issues that are most relevant in the light of my research questions will be focused on and issues like the burden of proof will only be mentioned briefly.

Due to the scarce research about international trade law in Sweden, the common knowledge about these issues must be regarded as limited. For that reason, Chapter 2 contains a presentation of general information about the WTO system in order to provide the reader with the necessary facts to understand the entire analysis. However, for the curious reader, any of the textbooks that have been used can gladly be recommended for further reading.

1.4 Method and sources

The method used in this thesis can be categorized as "traditional legal method". This means that in order to answer the research questions, different legal sources have been consulted to see how they handle the problems in question. In other words, my method has involved turning to WTO law, case law and scholarly comments to see how the different sources answer the questions.

[9] Hereinafter called *EC-Tariff Preferences* case.
[10] See Chapter 5.

The sources used in this thesis can be divided into primary sources and secondary sources. The category of primary sources, on the one hand, includes multilateral agreements, EU Regulations, WTO Agreements and WTO case law. The category of secondary sources, on the other hand, refers to literature, academic journals and websites. The sources used for this thesis has been consciously selected in order to guarantee a high reliability and trustworthiness of the thesis' result. The journals that have been used are all well-reputed international journals.[11] In addition to strictly academic material, some websites have been used. However, the content of the websites has been evaluated as trustworthy since they are all official websites of well-known international organizations, e.g. EU, WTO and UN.

1.5 Disposition

This thesis will have the following structure. Chapter 2, following this introduction, provides a summary of the main features of the WTO system. This chapter is meant to provide a reader who has not previously been in contact with international trade law with basic knowledge about the WTO and its legal rules. Chapter 3 will present the special situation of developing countries in the WTO. Here, the rules of special and differential treatment of developing countries are presented. Moreover, the background and features of GSP programmes are examined in detail. In Chapter 4, the main focus will be on the EU and its different preferential systems. First, the EU's various GSP schemes, that have existed since the 1970's are presented. Second, another set of preferential agreements is examined briefly. Chapter 5 includes a comprehensive review of the *EC-Tariff Preferences* case. The chapter starts with a summary of the facts of the case and continues with the rulings of the panel and the Appellate Body. This chapter ends with a summary of the existing scholarly comments on the case. In Chapter 6, the results of the thesis are analyzed and later summarized in Chapter 7.

[11] Lund University LibHub (http://libhub.sempertool.dk/libhub) has been used to access the journals online.

2 The WTO in a nutshell

2.1 The World Trade Organization

The WTO was established in 1995 and is one of our youngest intergovernmental organizations. Despite its short history, it has quickly become one of the most influential organizations in our increasingly globalized world.[12]

2.1.1 The WTO origins

The origins of the WTO can be traced back to the General Agreement on Tariffs and Trade (GATT). GATT was negotiated in the aftermath of World War II when the US and its allies gathered in order to conclude an agreement for the reduction on tariffs on trade in goods.[13] At this time, the world leaders also had the aspiration of creating an International Trade Organization (ITO). This project, however, never came into being due to difficulties for the US in agreeing to such extended commitments that an ITO would have called for.[14] Instead, the GATT of 1947 with its less-invasive commitments turned out to be an excellent compromise and the agreement got as many as 23 signatories from the start.[15]

Even though the GATT lacked an institutional framework, it had great success in decreasing the tariffs on trade in goods.[16] The GATT of 1947 has been renegotiated and developed during the years in different negotiating rounds.[17] The most important round was the Uruguay Round, which took place 1986-1994. After many years of difficult and demanding negotiations, the Uruguay Round resulted in the creation of the international organization of world trade that we have today, the WTO. The coverage also expanded through the Uruguay Round, thereby not only covering trade in goods as the GATT 1947 had done but also areas like services and intellectual property.[18]

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[12] Van den Bossche, *supra* note 1, p 77.
[13] Lester, Simon & Mercurio, Bryan, (2008) *World Trade Law: Texts, Materials and Commentary*. Portland: Hart Publishing, p 65-67.
[14] Van den Bossche, *supra* note 1, p 80-81.
[15] Lester & Mercurio, *supra* note 13, p 67.
[16] Van den Bossche, *supra* note 1, p 81.
[17] For a complete list of the GATT negotiation rounds, see WTO, 'Understanding the WTO, The GATT Years: from Havana to Marrakesh' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm#rounds (visited 29 October 2010).
[18] Lester & Mercurio, *supra* note 13, p 70.

The current membership of the WTO is 153 members.[19] A number of states are currently negotiating their accession to the organization.[20]

2.1.2 The main objective

The main idea behind the GATT and later the WTO has been that open markets and non-discrimination contribute to increased welfare in the world.[21] Consequently, the main purpose of the WTO is to reduce barriers to world trade, which is accomplished e.g. by lowering tariffs. To achieve this, the WTO functions as a place where members can join in negotiations for binding agreements, a system of trade rules and a place where members can resolve their trade disputes.[22]

One of the underlying economic theories behind the liberalization of trade is the concept of comparative advantage, which in short means that countries should specialize in producing what they are good at and exchanging these products through trade for goods they are less good at producing, and that ultimately this cooperation will result in benefits for all parties.[23] According to the WTO itself, "GATT and the WTO have helped to create a strong and prosperous trading system contributing to unprecedented growth."[24] During the first 25 years of GATT, the tariffs on industrial goods were lowered from an average of 40 per cent to about 4 per cent.[25] However, the WTO has been exposed to extended critique as well. The debate about the pros and cons of the liberalization of trade is an ongoing discussion.[26]

2.1.3 Structure and decision-making

The WTO is a member-driven organization in the sense that the highest decision-making body is the Ministerial Conference, which consists of representatives of all the member states. The Ministerial Conference meets

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[19] It should be added that all members are not states, but can also be separate customs territories, e.g. Hong Kong. The EU is a member of its own even if all the member states of the EU are separate members of the WTO, see Van den Bossche, *supra* note 1, p 105.
[20] WTO, 'Understanding the WTO, Organization, Members and Observers' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited 29 October 2010).
[21] Hoekman, Bernard M. & Mavroidis, Petros C., (2007) *The World Trade Organization. Law, Economics and Politics.* London: Routledge, p 1.
[22] WTO, 'Understanding the WTO, Basics, What is the World Trade Organization?' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (visited 29 October 2010).
[23] Hoekman, Bernard M. & Kostecki, Michel M., (2001) *The Political Economy of the World Trading System. The WTO and Beyond.* Oxford: Oxford University Press. 2nd edition, p 26.
[24] WTO, 'The WTO in Brief, The Multilateral Trading System – past, present and future' available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm (visited 29 October 2010).
[25] *Consequences of the WTO-agreements for Developing Countries*, *supra* note 2, p 18.
[26] See, e.g, Van den Bossche, *supra* note 1, p 19.

at least every two years.[27] Below the Ministerial Conference in the WTO structure, we find the General Council, Dispute Settlement Body (DSB) and the Trade Policy Review Body. On the even lower levels, we find specialized councils, committees and working groups.[28] For a complete map of the WTO structure, see Supplement A.

The most common way of making decisions in the WTO is through consensus. This means that if none of the members at the meeting formally object to the decision it will be approved (i.e. it is not equivalent to unanimous affirmative consent). If consensus cannot be reached, there is the possibility of majority voting.[29] Separate from the normal procedure in the decision-making process are special rules regarding decisions by the DSB, authoritative interpretations, accessions, waivers, amendments and budget/financial questions.[30]

2.1.4 Sources of law

When dealing with WTO law it is important to be familiar with the different sources of law. The principal sources of law are the multilateral trade agreements that have been adopted by the members. The most important one is the *Marrakesh Agreement Establishing the World Trade Organization* (often referred to as 'the *WTO Agreement*'), which is the agreement that establishes the entire WTO.[31] In addition to the *WTO Agreement*, other important agreements are e.g. *GATT 1994*[32], *Agreement on Subsidies and Countervailing Measures*, *Anti-Dumping Agreement*, *Agreement on Sanitary and Phytosanitary Measures* (SPS) and *Agreement on Technical Barriers to Trade* (TBT).[33]

There are some agreements that are specific to particular areas of trade, e.g. *General Agreement on Trade in Services* (GATS) and *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPs). The *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides rules and procedures regarding the dispute settlement system.[34]

In addition to the aforementioned agreements, the WTO dispute settlement reports, acts of WTO bodies, customary international law, general principles of law and other international agreements are some examples of sources that

[27] Lester & Mercurio, *supra* note 13, p 84.
[28] Van den Bossche, *supra* note 1, p 120.
[29] Lester & Mercurio, *supra* note 13, p 86, 88.
[30] Van den Bossche, *supra* note 1, p 144.
[31] *Ibid*. p 44.
[32] GATT 1994 is in principle the same as GATT 1947 but with some supplementing understandings to develop specific provisions, see Cottier, Thomas & Oesch, Matthias, (2005) *International Trade Regulation. Law and Policy in the WTO, The European Union and Switzerland: cases, materials and comments.* Berne: Staempfli Publishers, London: Cameron May, p 89.
[33] *Ibid*.
[34] *Ibid*. p 89-90.

are of great importance in WTO law.[35] It should be noted that the relationship between public international law and international trade law is highly controversial and well debated among scholars.[36]

2.1.5 Dispute settlement system

Over the years, the WTO dispute settlement system has "become one of the most important and widely utilised international tribunals"[37]. The dispute settlement system offers a "compulsory, binding and enforceable" method of dealing with disputes arising under WTO law.[38] In comparison to other international tribunals, the WTO dispute settlement system is considered successful regarding receiving complaints, delivering judgments and obtaining member compliance.[39]

When a dispute arises between member states, the dispute settlement system provides a special set of procedures and rules, found in the DSU. To make the system efficient the DSU contains very precise (and short) time spans for the WTO institutions and their members to achieve their obligations under the DSU.[40]

The first step in a dispute resolution is for the member to request consultations.[41] If these consultations turn out not to be fruitful, the member can request the establishment of a panel, which is established by the DSB. The panel functions like a tribunal and has the mandate to resolve the dispute. The judgement is presented in a report that is circulated among the members and subsequently adopted by the DSB.[42] The panel report may be appealed, to the Appellate Body, by any party to the conflict.[43] The AB has the power to uphold, modify or reverse the panel findings. The AB's report is also circulated and later adopted by the DSB.[44]

The losing party in the dispute has to inform the DSB of its intensions of implementing the ruling of the panel/AB. The implementation has to be

[35] Van den Bossche, *supra* note 1, p 55.
[36] To get an overview of different standpoints in the debate, see e.g. Pauwelyn, Joost, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95 *American Journal of International Law* 535-578 and Trachtman, Joel P., 'Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law' by Joost Pauwelyn *American Journal of International Law* 855-861.
[37] Lester & Mercurio, *supra* note 13, p 153.
[38] *Ibid*.
[39] *Ibid*.
[40] Matsushita, Mitsuo; Schoenbaum, Thomas J. & Mavroidis, Petros C. (2006) *The World Trade Organization: Law, Practice, and Policy.* Oxford: Oxford University Press. 2nd edition, p 113.
[41] *Ibid*.
[42] *Ibid*. p 115-116.
[43] It must be noted, however, that the appeal is restricted to issues of law covered by the panel, see Lester & Mercurio, *supra* note 13, p 161.
[44] *Ibid*.

done within a 'reasonable period of time'[45] and this is inspected by the DSB.[46] If a member does not implement the judgement and instead sticks to measures that are non-consistent with WTO law, the system allows for compensation and suspension of concessions and other obligations.[47]

2.2 Fundamental WTO law principles

Even though WTO law contains a vast range of rules, there are some fundamental principles that underpin the entire system. These principles aim at fighting protectionism and discrimination but also at creating a trading environment that is stable and predictable.[48] The principles will be presented in short in the following. Due to my research questions, the focus will be on the principle of non-discrimination.

2.2.1 Principle of non-discrimination

One of the most fundamental principles in WTO law is the principle of non-discrimination. The absolute importance of non-discrimination in the WTO is manifested in the preamble of the *WTO Agreement*, which states that one of the main objectives of the WTO is "the elimination of discriminatory treatment in international trade relations".[49] The most obvious expressions of the principle of non-discrimination are the principles of most-favoured-nation (MFN) treatment and national treatment.[50]

2.2.1.1 Principle of MFN treatment

The principle of MFN treatment is found in Article I of GATT 1994 and contains an obligation, regarding imports or exports, for members not to discriminate between like products based on their origin. In other words, if one member grants benefits to another member, the same benefits must be granted immediately and unconditionally to like products originating from all members.[51] For example, if Sweden has a ten per cent tariff on imported cars from the US, the same tariff must apply to the same type of cars from China. The obligation prohibits not only *de jure* discrimination but also *de facto* discrimination.[52]

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[45] For a complete explanation of the concept, see e.g. Matsushita *et al*., *supra* note 40, p 154 *et seq*.
[46] Articles 21(3) and 21(6) of the DSU, see Van den Bossche, *supra* note 1, p 278-279.
[47] Article 22(1) of the DSU, see Van den Bossche, *supra* note 1, p 220.
[48] *Consequences of the WTO-agreements for Developing Countries*, *supra* note 2, p 23.
[49] *Marrakesh Agreement Establishing the World Trade Organization*, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (visited 15 December 2010).
[50] Lester & Mercurio, *supra* note 13, p 273.
[51] Van den Bossche, *supra* note 1, p 309-310.
[52] Egelund Olsen, Birgitte; Steinicke, Michael & Engsig Sørensen, Karsten (eds.), (2006) *WTO Law – from a European Perspective*. Copenhagen: Thomson, p 189.

The application of Article I has led to several interpretative challenges. First, there is the problem of what is meant by 'like products'. There is a vast case law examining this issue.[53] However, it can be noticed that the interpretation of 'like products' in Article I has been given a narrower scope than the one in Article III (see below).[54] Second, it must be determined what measures are covered by the obligation. As stated in the text, 'any advantage' granted is covered, which thereby extends to both border measures and internal measures.[55]

2.2.1.2 Principle of national treatment

The principle of national treatment is found in Article III of GATT 1994 and states that it is prohibited for a member to discriminate between domestic and foreign like products. It prevents members from treating imported products less favourably than like domestic products.[56] In contrast to the MFN obligation, Article III only covers internal measures and not border measures.[57] Covered measures have been divided into internal taxation measures (paragraph 2) and internal regulation measures (paragraph 4). In both cases, granting less favourable conditions for foreign products is not allowed.[58] As mentioned before, the meaning of 'like products' in Article III is more extensive than in Article I and includes not only what is meant by like but also directly competitive or substitutable products. That is clear directly from the second sentence of paragraph 2 concerning taxation measures and the same interpretation has been established through case law concerning regulation measures.[59]

2.2.2 Principle of predictability

The concepts of predictability and stability are essential to create a well-functioning trading system. In order to accomplish this, the WTO system is built on the idea of transparency. For example, members have a duty to publish their rules and guidelines regarding import and export.[60] By reassuring that trade commitments are binding on each member, businesses know what to expect in trade relations with other countries. This predictability will arguably encourage a greater trade flow between countries.[61]

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[53] For a good overview, see Van den Bossche, *supra* note 1, p 314-316 about e.g. *Spain – Unroasted Coffee*.
[54] Matsushita *et al*., *supra* note 40, p 209.
[55] *Ibid*. p 206.
[56] Van den Bossche, *supra* note 1, p 326-327.
[57] *Ibid*. p 329.
[58] *Ibid*. p 330.
[59] Seth, Torsten, (2004) *WTO och den internationella handelsordningen.* Lund: Studentlitteratur, p 135.
[60] *Consequences of the WTO-agreements for Developing Countries*, *supra* note 2, p 24.
[61] WTO, 'Understanding the WTO, Basics, Principles of the Trading System' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (visited 29 October 2010).

2.2.3 GATT exceptions

In addition to the comprehensive WTO obligations, there are also rules that provide exceptions to these obligations. The most famous exception rule is found in Article XX of GATT 1994. The basic idea behind this Article is to give members a chance to protect important non-economic societal values, e.g. public morals, human and animal health and environment.[62] However, to be able to justify a measure that normally would violate a GATT obligation, a member must first fulfil one of the specific exceptions listed in paragraphs (a) to (j); and second fulfil the requirements of the chapeau[63] of Article XX. The chapeau requires that the measures are not 'arbitrary' discriminatory, 'unjustifiable' discriminatory or a 'disguised restriction of international trade'.[64]

Another way for members to avoid their obligations is to enter into preferential trade agreements (PTAs). This opportunity is reflected in Article XXIV of GATT 1994. This provision authorizes the creation of customs unions and free-trade areas (FTAs). By creating these, it is possible to agree on regulations that would otherwise violate trade rules like the MFN obligation. The term PTAs includes both custom unions and FTAs and can be bilateral, plurilateral or regional.[65] Well-known regional integration projects are the EU, the North American Free Trade Agreement (NAFTA) and Association of Southeast Asian Nations (ASEAN).[66]

As will be presented in the following chapters, exception provisions are also designed for the special situation of developing countries.

[62] Van den Bossche, *supra* note 1, p 598.
[63] The chapeau refers to the introductory part (found prior to the list of exceptions) of Article XX.
[64] Lester & Mercurio, *supra* note 13, p 409.
[65] *Ibid*. p 343.
[66] Van den Bossche, *supra* note 1, p 650.

3 Developing countries in the WTO

The situation of developing countries in the GATT/WTO has changed significantly over the years. In the beginning of the GATT history developing countries were scarcely present in the evolving world trade project, as opposed to today when the majority of the WTO members are developing countries.[67] According to the WTO, more than three quarters of WTO members are classified as developing or least developed countries (LDCs).[68]

The growing attention to the conflict between developing and developed countries in international trade was set off in 1964 by the establishment of the United Nations Conference on Trade and Development (UNCTAD). UNCTAD's main objective was to promote economic growth in developing countries through international trade.[69] Due to the work of UNCTAD, a new Part IV with the title 'Trade and Development' was included into the GATT. This new part was mainly important as a political statement verifying the special situation of developing countries.[70]

The focus on development issues continued during the Tokyo and Uruguay Rounds. In 2001, the WTO members initiated the Doha Round, also called the 'Doha Development Agenda' whose explicit purpose was to highlight the special situation of developing countries further.[71]

3.1 Defining 'developing' and 'least developed'

The term 'developing countries' is not defined in the WTO rules. Currently, there is controversy regarding which countries should fall within the concept. The classification is made mainly through self-selection.[72] However, other members can challenge the categorization when the alleged developing country claims the special treatment.[73] This thesis will sometimes use the term 'developing countries' in a broad sense, including

[67] Lester & Mercurio, *supra* note 13, p 779.
[68] WTO, 'The WTO in Brief, Developing countries', available at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr04_e.htm (visited 12 October 2010).
[69] Van Houtte, Hans, (2002) *The Law of International Trade*. London: Sweet & Maxwell. 2nd edition, p 54.
[70] *Consequences of the WTO-agreements for Developing Countries*, *supra* note 2, p 29.
[71] Cottier & Oesch, *supra* note 32, p 73-75.
[72] Matsushita *et al*., *supra* note 40, p 764.
[73] WTO, 'Who are the developing countries in the WTO?', available at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm (visited 12 October 2010).

LDCs. The definition of 'least developed countries' is not as problematic, since the UN has determined three criteria[74] for the identification of LDCs and published a list of the countries fulfilling these criteria. To date, there are currently 49 countries listed as LDCs by the UN, whereof 32 are WTO members.[75]

3.2 Special and differential treatment

The WTO system provides a number of special rules concerning developing countries and LDCs, which aim at meeting these countries' special needs. The basic idea has been to offer these countries more favourable trade terms in order to create improved economic development.[76]

In general, special and differential treatment is meant to enhance market access conditions for these countries and to offer them more flexibility in their use of trade measures, by exempting them from various regulations.[77] It should be noted that a concept of graduation exists, which means that the developing countries will be phased out of the preferential treatment as soon as their economic conditions improve to the level at which the country does no longer need the benefits anymore.[78]

Some examples of provisions providing special and differential treatment are GATT Article XVIII, DSU Articles 4.10 and 12.10, which offer more flexibility and extended time-periods for developing countries in both material and procedural rules. GATT Part IV also introduces the important concept of non-reciprocity, which means that developed countries should not expect equivalent trade concessions in return from developing countries.[79] Another product of the special and differential treatment is the granting of Generalized System of Preferences (GSP), which will be introduced and discussed in detail in the following chapter.

3.3 The Enabling Clause

Since special and differential treatment for developing countries clearly violates the MFN obligation, WTO members have been required to solve

[74] See UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, 'The Criteria for the Identification of the LDCs', available at http://www.un.org/special-rep/ohrlls/ldc/ldc%20criteria.htm (visited 12 October 2010).
[75] WTO, 'Understanding the WTO, The Organization, Least-developed countries', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (visited 12 October 2010).
[76] Seth, *supra* note 59, p 129.
[77] Cottier & Oesch, *supra* note 32, p 554-555.
[78] Koul, Autar Krishen, (2005) *Guide to the WTO and GATT. Economics, Law, and Politics.* The Hague: Kluwer Law International, p 576.
[79] Lester & Mercurio, *supra* note 13, p 789.

this clash of rules. The history goes back to the first UNCTAD session that, as mentioned before, took place in 1964. Here countries agreed that developed countries should be encouraged to grant preferential non-reciprocal treatment to developing countries. At the second session, UNCTAD II held in New Delhi in 1968, this was further elaborated. The adopted Resolution 21 (II) established a system for trade preferences that were 'generalized, non-reciprocal and non-discriminatory'. This constituted the first step towards what later became the GSP programmes.[80]

In order to avoid the MFN obligation, the GATT members approved a waiver to GATT Article I. It must however be noted that no formal reference was made to GATT Article XXV:5, which formulates members' right to make waivers, and for this reason it can be questioned if the decision was a true waiver.[81] The waiver was the first legal authorization of forming GSP programmes.[82] The waiver is often referred to as the 1971 GSP Decision and was intended to be valid for ten years.[83] However, the members were not satisfied with the formation of this temporary waiver and decided in 1979, during the Tokyo Round, to create a permanent waiver by adopting the so-called Enabling Clause.[84] The Enabling Clause was mainly a summation of earlier progress and did not imply any new material rules of importance.[85]

Paragraph 1 of the Enabling Clause establishes the possibility of circumventing GATT Article I and states as follows:

> *1. Notwithstanding* the provisions of Article I of the General Agreement, contracting parties may accord *differential and more favourable treatment* to developing countries*, without according such treatment to other contracting parties.
>
> *The words "developing countries" as used in this text are to be understood to refer also to developing territories.[86]

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[80] Turksen, Umut, 'The WTO Law and the EC's GSP+ Arrangement' (2009) 43(5) *Journal of World Trade* 927-968, p 929.
[81] Bartels, Lorand, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Program' (2003) 6(2) *Journal of International Economic Law* 507-532, p 511-512.
[82] Turksen, *supra* note 80, p 931.
[83] Lester & Mercurio, *supra* note 13, p 784, 791. The full name of the decision is Generalized System of Preferences, Decision of 25 June 1971, GATT Doc L/3545, available at http://www.wto.org/gatt_docs/English/SULPDF/90840258.pdf (visited 14 October 2010).
[84] Zagel, Gudrun, 'The WTO and Trade-Related Human Rights Measures: Trade Sanctions vs. Trade Incentives' (2004) 9 *Austrian Review of International and European Law* 119-160, p 146. The full name of the decision is Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (hereinafter called the Enabling Clause), Decision of 28 November 1979, GATT Doc L/4903, available at http://www.wto.org/gatt_docs/English/SULPDF/90970166.pdf (visited 14 October 2010).
[85] Santos, Norma Breda dos; Farias, Rogério & Cunha, Raphael, 'Generalized System of Preferences in General Agreements on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39(4) *Journal of World Trade* 637-670, p 652.
[86] Enabling Clause, *supra* note 84, emphasis added.

Paragraph 2 of the Enabling Clause specifies the different situations in which the exemption in paragraph 1 applies. GSP programmes are mentioned in paragraph 2(a), which states together with corresponding footnotes as follows:

> 2. The provisions of paragraph 1 apply to the following:**
> (a) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the *Generalized System of Preferences****;
>
> **It would remain open for the CONTRACTING PARTIES to consider on an ad hoc basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.
> ***As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "*generalized, non-reciprocal and nondiscriminatory* preferences beneficial to the developing countries".[87]

By referring back to the 1971 GSP Decision in one of the footnotes, the Enabling Clause affirms that the GSP schemes should be 'generalized, non-reciprocal and non-discriminatory'. This observation will be of great importance later when discussing the *EC-Tariff Preferences* case.

Moreover, paragraph 2 authorizes: (1) differential and more favourable treatment concerning non-tariff measures governed by GATT; (2) the formation of preferential trade agreements amongst developing countries without fulfilling GATT Article XXIV; and (3) special treatment of LDCs.[88]

Paragraphs 3(a) and (b) of the Enabling Clause require that the tariff preferences shall not create burdens on other members and not impede the further reduction of trade barriers.[89] Paragraph 3(c) requires that any differential and more favourable treatment:

> shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond *positively* to the *development, financial and trade needs* of developing countries.[90]

The legal status of the Enabling Clause within the WTO framework is not completely clear. Like the 1971 GSP Decision, the Enabling Clause does not include a formal reference to GATT Article XXV:5 and is therefore in a strict sense not a true waiver. However, it can be argued that the Enabling Clause is to be regarded as an 'instrument' forming part of GATT 1994 and therefore binding for the members. This argument is presented by Bartels who concludes that the Enabling Clause is one of the 'other decisions of the

[87] *Ibid*., emphasis added.
[88] *Ibid*.
[89] *Ibid*.
[90] *Ibid*., emphasis added.

CONTRACTING PARTIES to GATT 1947' described in paragraph 1 (b)(iv) of GATT 1994 and is therefore an 'instrument' of GATT 1994.[91]

Another interesting issue regarding the Enabling Clause is the fact that panels do not have direct jurisdiction of claims based on the Enabling Clause. This can be explained by the fact that panels formed under the DSU only have jurisdiction over claims brought under the dispute settlement provisions of any of the covered agreements. The Enabling Clause does not contain such a provision.[92] In order to get around this issue, claims should be based on the argument of a GATT Article I violation that is not justified by the exception in the Enabling Clause, i.e. by arguing that the Enabling Clause functions more as an exception than an independent instrument. The question of the burden of proof in a claim about the Enabling Clause is also interesting.[93] The wording of the Enabling Clause is in many ways ambiguous and the uncertainty about the content of the provision has resulted, *inter alia*, in the *EC-Preferences* case.

3.4 Generalized system of preferences

As mentioned before, one of the main exceptions created to address the special situation for developing countries is the possibility for WTO members to grant GSP programmes. The Enabling Clause is the legal basis for the creation of these programmes.

3.4.1 Basic idea

GSP programmes aim to encourage trade with developing countries by offering lower tariffs to developing countries compared to other countries.[94] In other words, the goal of these programmes is to promote developing country export and hereby promote the industrialization and economic growth in developing countries.[95]

The Enabling Clause sets up three conditions for GSP programmes, i.e. to be 'generalized', 'non-discriminatory' and 'non-reciprocal'.[96] It can be noted that the condition of non-reciprocity is contrary to the otherwise strong principle of reciprocity that is present in the WTO system.[97]

GSP programmes are voluntary, i.e. developing countries cannot request for preferential treatment themselves. Instead, the programmes are voluntary

[91] Bartels, *supra* note 81, p 514-516.
[92] *Ibid*. p 516.
[93] *Ibid*. p 516-517.
[94] Lester & Mercurio, *supra* note 13, p 784.
[95] Bartels, *supra* note 81, p 511.
[96] Paragraph 2(a) and footnote 3 of the Enabling Clause, *supra* note 84.
[97] Bartels, *supra* note 81, p 527.

concession from developed countries.[98] Some argue that the voluntary nature implies that developing countries are entirely deprived of the possibility of challenging GSP programmes' conformity with the Enabling Clause. There are different views on this issue among scholars.[99]

GSP schemes are often designed with short-term mandates, which mean that they have to be renewed relatively often. As an example, the EU GSP scheme is valid for two years at a time.[100] The Enabling Clause also introduced a principle of graduation, which means that developed countries can design their GSP schemes to allow graduation from the programmes as the developing countries reach a higher level of economic development.[101]

3.4.2 Different GSP schemes

To date, there are currently 13 different national GSP schemes, which have been notified to the UNCTAD secretariat. The following countries/members have accorded GSP schemes: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the United States.[102] The various GSP schemes are designed in different ways. The two most important GSP schemes are the ones granted by the EU and the US. Even though this thesis mainly focuses on EU's GSP scheme, a short presentation of the US scheme is justified due to the country's large influence in world trade.

The US GSP scheme was first instituted in 1976 and authorized by the Trade Act of 1974. The most recent GSP scheme was valid until the end of 2010 and offered preferential[103] duty-free treatment to over 3 400 products originating from 131 developing countries (including 44 LDCs).[104] In other words, the programme granted zero tariff rates to designated beneficiaries. If a product was classified as 'import-sensitive' by the President it was not

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[98] *Ibid*. p 513.
[99] See, Grossman, Gene M., & Sykes, *supra* note 5, (arguing that the voluntary aspect does not matter) and Howse, Robert, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4(2) *Chicago Journal of International Law* 385-405 (arguing that the voluntary aspect means that the Enabling Clause requirements are non-binding).
[100] See Chapter 4.
[101] Paragraph 7 of the Enabling Clause, *supra* note 84.
[102] UNCTAD, 'About GSP', available at http://www.unctad.org/Templates/Page.asp?intItemID=2309&lang=1 (visited 15 October 2010).
[103] In addition to the GSP programmes, the US offers the following preferential programmes to the developing world: the African Growth and Opportunity Act, the Caribbean Basin Initiative programme and the Andean Trade Preference Act programme, see USTR, Trade & Development, 'Preference Programs', available at http://www.ustr.gov/trade-topics/trade-development/preference-programs (visited at 3 December 2010).
[104] USTR, 'US Generalized System of Preferences – Guidebook' p 3, available at http://www.ustr.gov/webfm_send/1597 (visited 3 December 2010).

covered by duty-free treatment. The US GSP scheme also included a graduation mechanism, which meant that the President determined when a country had become a 'high-income country'. The US GSP programme put up mandatory and discretionary criteria for country eligibility.[105]

3.4.3 Concept of conditionality

The concept of conditionality in international law generally refers to the idea of linking conditions with the granting of benefits or aid interventions, e.g. when a state links development aid with human rights conditions. Such conditions are found in various international agreements.[106]

In the context of GSP programmes, the concept of conditionality is quite controversial. As pointed out in the introduction, the WTO legality of attaching conditions to GSP benefits is debateable, and there are different opinions on the matter. On the one hand, developing countries are generally opposed to conditionality, because it is regarded as conflicting with the main objective of GSP programmes. In addition, UNCTAD has also raised its voice, arguing that conditions attached to tariff preferences are in violation of the non-reciprocity requirement.[107] Critics of conditionality describe the concept as being an expression of "unilateralism, extraterritoriality and protectionism".[108] On the other hand, developed countries are for self-explanatory reasons generally in favour of conditionality. It can even be argued that the possibility for developed countries to attach conditions to their GSP programmes is in fact necessary to make the programmes acceptable to developed countries. To my knowledge, the EU and the US are the only developed countries that use conditionality in their GSP schemes.

The concept of conditionality in GSP programmes is usually described as existing in two different forms: (1) positive conditionality and (2) negative conditionality. Positive conditionality means that certain criteria/conditions need to be fulfilled in order for developing countries to be granted these preferences. In contrast, negative conditionality means that if certain conditions are fulfilled the developing countries are consequently excluded from being granted preferences.[109] The difference can most easily be illustrated by examples from the EU and US GSP schemes.

The US GSP scheme corresponds to negative conditionality. The US system sets up certain 'mandatory criteria' that if fulfilled will lead to countries being deemed as ineligible as beneficiaries. These conditions are e.g.

[105] Humbert, *supra* note 7, p 286-288.
[106] Bartels, Lorand, (2005) *Human Rights Conditionality in the EU's International Agreements*. Oxford: Oxford University Press, p 7.
[107] Irish, Maureen, 'GSP Tariffs and Conditionality: A Comment on *EC-Preferences*' (2007) 41(4) *Journal of World Trade* 683-698, p 690.
[108] *Ibid*. p 683.
[109] Zagel, *supra* note 84, p 144-145.

communism, involvement in terrorism, violation of worker rights and child labour.[110]

The EU's system is built up in a different way and corresponds mainly to positive conditionality. Positive conditionality is illustrated by the 'special incentives arrangements' that the EU has set up as part of its GSP. In these arrangements, the EU grants even lower tariffs to developing countries that fulfil certain labour or environment standards.[111] Over the years, the conditions have naturally evolved and today the conditions in addition entail the ratification and implementation of core human rights conventions.[112] However, EU's GSP scheme also contains elements of negative conditionality, embodied in the rules of withdrawal. Through these rules, EU holds the right to suspend benefits to developing countries that inter alia engage in serious violations of human and labour rights. For example, EU has suspended the benefits to Myanmar and Belarus.[113] In the beginning of 2010, EU also decided to withdraw their additional preferences to Sri Lanka based on the country's failure to implement relevant human rights conventions.[114]

The concept of conditionality is sometimes described as a 'carrot-and-stick' approach meaning that developed countries are using incentives and punishment in their GSP programmes in order to achieve desired results among developing countries.[115]

3.4.4 Critique of GSP

Regardless of how charitable the intentions of the developed countries may seem, it must be noted that many voices have pointed out the general insufficiency of special and differential treatment in actually meeting the developing needs of the developing countries.[116] As a result, a reform eliminating the practice of special and differential treatment has been

[110] Bartels, Lorand, (2005) 'The WTO Appellate Body Report in EC - Conditions for the Granting of Tariff Preferences to Developing Countries (WT/DS246/AB/R) and its Implications for Conditionality in GSP Programs' in Bürgi, Elisabeth; Pauwelyn, Joost & Cottier, Thomas (eds.) *Linking Trade and Human Rights: Framework and Case Studies*, Oxford University Press, Forthcoming, available at http://ssrn.com/abstract=667283 (visited 4 January 2011), p 4.
[111] Bartels, *supra* note 106, p 69.
[112] For a more detailed description, see Chapter 4.
[113] Bartels, *supra* note 106, p 68-69.
[114] European Commission, Press release, 'EU temporary withdraws GSP+ trade benefits from Sri Lanka', 15 February 2010, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=515 (visited 3 December 2010).
[115] Orbie, Jan & Tortell, Lisa, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14(5) *European Foreign Affairs Review* 663-681, p 666.
[116] See, e.g. Hart, Michael & Dymond, Bill, 'Special and Differential Treatment and the Doha "Development" Round' (2003) 37(2) *Journal of World Trade* 395-415, p 395.

advocated by scholars. Universal rules applying to all WTO members or an increased use of PTAs have been proposed as potential substitutes.[117]

There is a massive economic literature arguing that trade preferences contribute little from a development perspective.[118] Authors like Grossman & Sykes, Humbert and Carrière & Melo point out the fact that many GSP rules impose compliance costs for developing countries that in reality totally or in large part consume the possible trade benefits. Particular focus is put on the rules of origin, which are criticized for being an obstacle for developing countries to taking advantage of the GSPs. In addition, the effect of the GSP programmes on development can also be questioned based on the fact that the products that are most important for developing countries' export are often excluded from the list of eligible products.[119]

In addition, Özden and Reinhardt conclude, in a study made of 154 developing countries between 1976-2000, that developing countries would likely be better off by being fully integrated in the world trade system. They argue that full-reciprocity would serve the developing countries better than GSP programmes.[120]

[117] See e.g. Hoekman, Bernard M., (2005) 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' p 223-244 in Petersmann, Ernst-Ulrich (ed.) with the assistance of Harrison, James *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance*. Oxford: Oxford University Press, p 241.

[118] See, e.g. Francois, Joseph; Hoekman, Bernard & Manchin, Miriam, 'Preference Erosion and Multilateral Trade Liberalization', (2006) 20(2) *World Bank Economic Review* 197-216, p 197.

[119] Grossman & Sykes, *supra* note 5, p 62-63, Humbert, *supra* note 7, p 298, 313 and Carrère, Céline & de Melo, Jaime, 'The Doha Round and Market Access for LDCs: Scenarios for the EU and US Markets' (2010) 44(1) *Journal of World Trade* 251-290, p 282.

[120] Özden, Caglar & Reinhardt, Eric, 'The Perversity of Preferences: GSP and Developing County Trade Policies, 1976-2000' (2005) 78 *Journal of Development Economics* 1-21, p 2-3.

4 EU's preference systems for developing countries

4.1 EU's GSP programmes

4.1.1 Before 2005

The EC was the first GATT member to establish a GSP scheme. This was done in 1971 and the first scheme was meant to be valid for only ten years but was later renewed for an additional ten years.[121] The GSP scheme has changed significantly over the years. The programmes before 1994 focused mainly on quantitative limits on importation of industrial or agricultural products. Later, the programmes focused more on tariff modulation and special incentives.[122] In the scheme, which was valid between 1995 and 2004, the overall structure was divided into: (1) the General Arrangement and (2) the Special Incentive Arrangements.[123]

The General Arrangement was, as the name indicates, general. It offered tariff preferences to all developing countries, covering almost all products. Products were separated into the two categories of 'non-sensitive' products and 'sensitive' products. The former products were awarded duty-free treatment whilst the latter products were awarded reduced tariffs.[124]

The idea behind the Special Incentive Arrangements was to include the concept of conditionality in order to encourage developing countries to follow certain policy goals. As a reward for following these, developing countries were granted additional trade preferences. In 2001, the GSP scheme was extended to include four Special Incentive Arrangements[125] which are as follows: (1) the Special Incentive Arrangements for the protection of labour rights[126]; (2) the Special Incentive Arrangements for the protection of the environment[127]; (3) the Special Arrangements for LDCs[128] (known as the 'Everything But Arms' (EBA) Arrangement); and (4) the Special Arrangements to combat drug production and trafficking[129]

[121] Turksen, *supra* note 80, p 932.
[122] Grossman & Sykes, *supra* note 5, p 46.
[123] Turksen, *supra* note 80, p 933.
[124] *Ibid*.
[125] The scheme was set out in Council Regulation (EC) No. 2501/2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004, 10 December 2001, OJ L 346/1.
[126] *Ibid*. Article 14 *et seq*.
[127] *Ibid*. Article 21 *et seq*.
[128] *Ibid*. Article 9.
[129] *Ibid*. Article 10 and Title IV.

(hereafter called the 'Drug Arrangements').[130] As described in detail in Chapter 5, the Drug Arrangements were found to be in violation of WTO law in the *EC-Tariff Preferences* case and as a result, the EC was forced to change its GSP scheme.

4.1.2 2005-2008

After the *EC-Tariff Preferences* case, the EC was, in accordance with the DSU, given reasonable time to implement the recommendations in the AB report. The limit of the reasonable time was disputed and had to be determined by an arbitrator. The arbitrator established that the reasonable time would expire on 1 July 2005. On 20 July 2005, the EC reported to the DSB that its new GSP scheme was in conformity with WTO law.[131]

In its new GSP scheme, the EC accentuated the importance of promoting sustainable development and good governance. This was most clearly manifested in the formulation of a new arrangement for special incentives.[132] The GSP scheme for 2006-2008 was set out in EC Regulation No. 980/2005 which established three separate arrangements; (1) the General Arrangement; (2) the Special Incentive Arrangement for Sustainable Development and Good Governance (known as the GSP+); and (3) the Special Arrangement for the LDCs (EBA Arrangement).[133]

First, the General Arrangement of 2006-2008 was similar to the previous one. It simply allowed for all goods (except agricultural products) classified as non-sensitive, according to Annex II, to be suspended from tariff duties. For goods classified as sensitive, the tariff duties were reduced. These general preferences were granted without any additional criteria.[134]

Moreover, the EC replaced the previous three Special Incentive Arrangements with one broader incentive for sustainable development and good governance, i.e. the GSP+.[135] In this way, the challenged Drug Arrangements in the *EC-Tariff Preferences* case were removed. The GSP+ provided additional preferences to countries fulfilling certain eligibility criteria.[136]
Developing countries had to fulfil three criteria in order to be granted the GSP+ preferences: (1) ratification and effective implementation of certain

[130] Turksen, *supra* note 80, p 933-934.
[131] WTO, 'Dispute Settlement: Dispute DS 246', available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm (visited 7 December 2010).
[132] Turksen, *supra* note 80, p 937-938.
[133] Article 7 *et seq*. of Council Regulation (EC) No. 980/2005 applying a scheme of generalised tariff preferences, 27 June 2005, OJ L 169/1, (hereinafter called the GSP Regulation 2005).
[134] *Ibid*. Article 7.
[135] Turksen, *supra* note 80, p 938.
[136] Article 9 of GSP Regulation 2005, *supra* note 133.

international conventions; (2) the status of 'vulnerable' country; and (3) following the application procedure set out in the Regulation.[137]

The ratification criterion included several components, which were to be fulfilled. The sixteen international conventions regarding human and labour rights listed in Part A of Annex III to the Regulation had to be ratified and effectively implemented. The same was demanded for at least seven of the eleven international conventions regarding environmental protection and governance principles listed in Part B of Annex III. Moreover, the applicant country had to commit itself to ratify and effectively implement the remaining conventions in Part B by 31 December 2008 and allow the EC to supervise the applicant's implementation record.[138]

In order to fulfil the vulnerability criterion, a country needed to lack diversification and had to be scarcely integrated in the international trading system.[139] The exact requirement was found in Article 9(3) and classified a vulnerable country as one:

> that is not classified by the World Bank as a high income country during three consecutive years, and whose five largest sections of its GSP-covered imports to the Community represent more than 75 % in value of its total GSP-covered imports, and whose GSP-covered imports to the Community represent less than 1 % in value of total GSP-covered imports to the Community.[140]

This application criterion required a future beneficiary to submit its application to the Commission before 31 October 2005.[141]

Lastly, the EBA Arrangement provided special tariff preferences for LDCs. The arrangement meant that LDCs were suspended entirely from tariff duties on most goods, except for arms and ammunition.[142]

4.1.3 Current programme

Like the GSP scheme of 2006-2008, the current one consists of the General Arrangement, the GSP+ and the EBA Arrangement. The current GSP scheme is set out by EC Regulation No. 732/2008 and came into force in the beginning of 2009 and is valid until the end of 2011.[143]

For most part, the GSP scheme has remained unchanged in comparison with the 2006-2008 version. One of the things the EU has introduced in the

[137] *Ibid*. Article 9, 10.
[138] *Ibid*. Article 9.
[139] Turksen, *supra* note 80, p 939.
[140] Article 9(3) of GSP Regulation 2005, *supra* note 133.
[141] *Ibid*. Article 10.
[142] *Ibid*. Article 12.
[143] Article 6 *et seq*. of Council Regulation (EC) No. 732/2008 applying a scheme of generalised tariff preferences, 22 July 2008, OJ L 211/3.

current scheme is an additional deadline in the application procedure. This means that if an applicant country was unable to fulfil the conditions by the first deadline of 31 October 2008, there was an additional deadline on 30 April 2010.[144] This made it possible to add new beneficiaries during the ongoing GSP programme.

EU's GSP scheme has a varying number of beneficiaries. At the moment, the General Agreement has 176 beneficiaries, the GSP+ has 16 beneficiaries and the EBA Arrangement has 49 beneficiaries.[145]

4.2 Other preferential agreements

4.2.1 Lomé convention and Cotonou agreement

In addition to GSP programmes, the EU has a second type of preferential treatment for developing countries. These other preferences consist of a series of bilateral treaties between the EU and the African, Caribbean and Pacific (ACP) countries.[146] Trade preferences to the ACP countries were first granted through the Lomé Convention of 1975. These preferences were, like GSPs, made on a non-reciprocal basis. However, since the early Lomé preferences had little impact, the Convention has been renegotiated three times. The Lomé Convention IV was later replaced by the Cotonou Agreement.[147]

The Cotonou Agreement[148] was signed in Cotonou (Benin) in 2000 for a period of 20 years.[149] The agreement has been revised both in 2005 and in 2010.[150] The partnership has "the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable

[144] *Ibid*. Article 9(1)(a).
[145] European Commission, 'Generalised System of Preferences', available at http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/ (visited 5 November 2010).
[146] Desta, Melaku Geboye, 'EC-ACP Economic Partnership Agreements and WTO Compatibility: an experiment in North-South inter-regional agreements?' (2006) 43 *Common Market Law Review* 1343-1379, p 1343.
[147] Santos *et al*., *supra* note 85, p 658.
[148] The full name of the agreement is 'Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part'. It was accepted through Council Decision (EC) No. 1/2000, OJ L 195/46 and the text of the agreement is found in the Annex to Decision No. 1/2000, OJ L 317/3.
[149] Mangeni, Francis, (2008) 'How Far Can LDCs Benefit from Duty-Free and Quota-Free Market Access? The Case of Uganda with respect to the EU Market' p 399-443 in Lee, Yong-Shik (ed.), *Economic Development through World Trade. A Developing World Perspective.* Alphen aan den Rijn: Kluwer Law International, p 401.
[150] European Commission. Development, Geographical Partnership, 'The Cotonou Agreement', available at http://ec.europa.eu/development/geographical/cotonouintro_en.cfm (visited 14 December 2010).

development and the gradual integration of the ACP countries into the world economy".[151]

The Cotonou Agreement contributed to two new developments. First, it extended the validity of Lomé Convention IV for a transitional period of eight more years. Second, it set out the agenda for the parties to negotiate a new set of trade agreements, so-called Economic Partnership Agreements (EPAs), in order to replace the Lomé Convention.[152]

4.2.2 Negotiations for EPAs

In order to continue their tradition of preferential trade, the EU and the ACP countries are currently negotiating with the aim of establishing EPAs. For the purpose of carrying out the negotiations, the ACP countries have divided themselves into seven different regions; five in Africa, one in the Caribbean and one in the Pacific.[153]

The idea behind EPAs is to reach WTO compatibility through the design of regional trade agreements (RTAs).[154] In this regard, the justification for EPAs differ dramatically compared to the legal justification for GSP schemes. Compared to other RTAs the EPAs go further by entailing a broader cooperation where mutual trade liberalizations are combined with development work.[155]

The RTA design results in the EPAs having a reciprocal character, the overall idea being that both the EU and the ACP countries liberalize market access.[156] This reciprocal character can however be questioned since the EPAs concluded so far entail generous rules of gradual liberalization on the behalf of the ACP countries opening up their markets for the EU.[157] In general, RTAs must fulfil an internal requirement of covering 'substantially all trade' between the RTA parties, which becomes important in the design of EPAs as well.[158]

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[151] Article 1 of the agreement, see Annex to Decision No. 1/2000, *supra* note 148.
[152] Desta, *supra* note 146, p 1346.
[153] European Commission, Trade, Creating Opportunities, Bilateral relations, 'Africa, Caribbean, Pacific', available at http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/africa-caribbean-pacific/ (visited 14 December 2010).
[154] *Ekonomiska Partnerskapavtal mellan EU och AVS-länderna*, 2009:3, Kommerskollegium, available at http://www.kommers.se/upload/Analysarkiv/Arbetsomr%C3%A5den/Handel%20med%20u-l%C3%A4nder/Rapport%20Ekonomiska%20Partnerskapsavtal%20mellan%20EU%20och%20AVS-l%C3%A4nderna.pdf (visited 14 December 2010), p 4.
[155] Kommerskollegium, 'EPA – Ekonomiska partnerskapsavtal', available at http://www.kommers.se/templates/Standard2____703.aspx (visited 14 December 2010).
[156] *Ekonomiska Partnerskapavtal mellan EU och AVS-länderna*, *supra* note 154, p 4.
[157] See e.g. the conditions of the EPA between EU and the Caribbean group, at European Commission, Trade, Wider agenda, Development, Economic partnership, 'Negotiations and agreements', available at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/negotiations-and-agreements/#_caribbean (visited 14 December 2010).
[158] Desta, *supra* note 146, p 1351.

The process of establishing EPAs between the EU and the ACP countries has been severely delayed. Only one EPA has been fully concluded so far, this being the one between the EU and the Caribbean countries. However, the other region groups have established interim agreements in order not to be entirely deprived of trade preferences when the original agreements expire.[159] The development of the EU's EPAs should be seen in the light of the current world trend of an increasing number of different PTAs.[160]

[159] For a the latest updates about the on-going negotiations, see European Commission, Trade, Wider agenda, Development, Economic partnership, 'Negotiations and agreements', *supra* note 157.

[160] Mavroidis, Petros C., 'WTO and PTAs: A Preference for Multilaterlism? *(or, the Dog That Tried to Stop the Bus)*' (2010) 44(5) *Journal of World Trade* 1145-1154, p 1145.

5 The EC-Tariff Preferences Case

5.1 Facts of the case

The *EC-Tariff Preferences* case was initiated by India, who challenged the EC's GSP scheme as in violation of the MFN treatment in Article I of GATT 1994.[161] The challenged GSP scheme was adopted to exist from 1 January 2002 to 31 December 2004.[162] This GSP scheme offered five different tariff preference arrangements.[163] India's original challenge was directed towards the Drug Arrangements and the two Special Incentive Arrangements for the protection of labour rights and the protection of the environment. India, however, later eliminated the two latter ones and challenged only the Drug Arrangements.[164]

The Drug Arrangements were designed to give preferences to countries having problems controlling drug production and trafficking. The EC had the full authority to decide which countries would be given the benefits.[165] The Drug Arrangements were granted to 12 countries: Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.[166]

In short, the Drug Arrangements gave the beneficiaries the possibility to get a duty-free access to the EC market regarding certain covered products, compared to other countries that had to pay full or only partly lowered tariff duties.[167]

The dispute was initiated in 2002 when India requested consultations with the EC regarding its GSP scheme. Since the consultations did not result in the resolution of the dispute, India requested the establishment of a panel in the same year.[168] In the proceedings, numerous Drug Arrangements beneficiaries and some additional countries announced their interest in participating as third parties. This gave them, *inter alia*, the rights to observe the meetings and to make an oral statement of their point of view in the dispute.[169]

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[161] Zagel, *supra* note 84, p 147.
[162] Lester & Mercurio, *supra* note 13, p 800.
[163] See Chapter 4.
[164] Lester & Mercurio, *supra* note 13, p 801.
[165] *Ibid*.
[166] Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, 1 December 2003, WT/DS246/R, para 2.7.
[167] *Ibid*. para 2.8.
[168] *Ibid*. paras 1.1, 1.3.
[169] *Ibid*. paras 1.7, 1.10.

5.2 Arguments of the parties

The main concern put forward by India was that the Drug Arrangements violated Article I:1 of GATT 1994 and were not justified under the Enabling Clause. First, India argued that a violation of Article I:1 of GATT 1994 was apparent since the Drug Arrangements did not fulfil unconditional MFN treatment.[170] Secondly, India also argued that the EC had not obtained a waiver that would have exempted them from the MFN obligation.[171]

Further, India argued that the Enabling Clause, specifically paragraph 2(a) together with footnote 3, only justified GSP schemes that did not discriminate between different developing countries.[172] India stated that the Drug Arrangements were discriminatory because they did not include *all* developing countries. Moreover, the meaning of 'non-discriminatory' had to be read as not making any distinction between different developing countries.[173] The above legal text also required the EC's preferences to be beneficial to *all* developing countries. Since the Drug Arrangements created market access opportunities for some countries, they automatically made it harder for others to access the market, which arguably was not beneficial to all developing countries.[174] Paragraph 3 of the Enabling Clause required the GSP scheme to respond positively to the needs of the developing countries. According to India, the Drug Arrangements were predominantly designed to meet the need of the EC. Therefore, India concluded that the Drug Arrangements were not fulfilling the requirements and could therefore not be justified under the Enabling Clause.[175]

It can be noted that India's concerns were probably influenced by political considerations. Pakistan was the only Drug Arrangements beneficiary that was not South or Latin American. Some argued that the inclusion of Pakistan was a reward from the EC for Pakistan's efforts to fight terrorism. It is probable that the inclusion of Pakistan would upset India since the two countries often compete regarding their exports.[176]

The EC defended its GSP scheme on several grounds, insisting on that the Drug Arrangements were consistent with the Enabling Clause and did not violate the EC's WTO obligations. First, the EC argued that the Enabling Clause created an autonomous and permanent right for developed countries to grant differential and favourable treatment to developing countries. Therefore a waiver was not necessary in order for GSP schemes to comply with Article I:1 of GATT 1994.[177] Secondly, the EC argued that the non-discriminatory requirement in paragraph 2(a) together with footnote 3 did

[170] *Ibid*. para 4.8.
[171] *Ibid*. para 4.18.
[172] *Ibid*. para 4.31
[173] *Ibid*. para 4.33.
[174] *Ibid*. paras 4.35, 4.38, 4.41.
[175] *Ibid*. paras 4.36, 4.39, 4.41.
[176] Lester & Mercurio, *supra* note 13, p 801.
[177] Panel report, *supra* note 166, para 4.42.

not entail an obligation to grant identical preferences to *all* developing countries. Non-discrimination should be interpreted to allow treating developing countries differently because of different developing needs, as long as it is done according to objective criteria.[178] The EC explained that the selection of the 12 beneficiaries was made based on an assessment of the severity of drug problems in these countries.[179]

Further, in contrast to India, the EC argued that the ordinary meaning of the term "developing countries" in paragraph 1 of the Enabling Clause did not entail *all* developing countries but was instead meant to allow beneficial treatment to only *some* developing countries.[180] Footnote 3 should not be read to entail an obligation for the GSP schemes to be beneficial to *all* developing countries. According to the EC, a different interpretation would go against the object and purpose of the Enabling Clause.[181] The EC emphasized that the Drug Arrangements had been designed to respond positively to the special needs of the beneficial countries.[182]

As a final justification, in the event the tribunals considered the Drug Arrangements as violating the Enabling Clause, the EC referred to Article XX(b) of GATT 1994. The EC argued that this exception applied since drugs posed a risk to human life and health and because the Drug Arrangements were necessary in order to fight these drug problems.[183]

5.3 Panel findings

In the following, the main findings of the panel are summarized. The panel started by determining that the Enabling Clause was to be regarded as an exception to Article I:1 of GATT 1994. The Enabling Clause did not exclude the applicability of Article I:1 of GATT 1994. Regarding the burden of proof, India had to show the violation of Article I:1 of GATT 1994 while the EC had to show the fulfilment of the Enabling Clause in order to avoid the MFN obligation.[184]

Without much difficulty, the panel concluded that the Drug Arrangements were not in accordance with the MFN obligation in Article I:1 of GATT 1994, since the preferences were not granted unconditionally to like products originating in all WTO members.[185] Regarding the consistency with the Enabling Clause the panel determined that the requirement of non-discrimination in footnote 3 requires that "*identical* tariff preferences under GSP schemes be provided to *all* developing countries without

[178] *Ibid*. paras 4.47, 4.64.
[179] *Ibid*. paras 4.75, 4.78.
[180] *Ibid*. para 4.45.
[181] *Ibid*. paras 4.79, 4.86.
[182] *Ibid*. para 4.88.
[183] *Ibid*. paras 4.92, 4.96-99.
[184] *Ibid*. paras 7.39, 7.41, 7.53.
[185] *Ibid*. para 7.60.

differentiation, except for the implementation of a priori limitations".[186] The panel also decided that the term "developing countries" in paragraph 2(a) include *all* developing countries with the exception of a priori limitations and LDCs.[187] In the case of the Drug Arrangements, the panel concluded that EC did not offer identical treatment to all developing countries (and the differentiation was not due to a priori limitations nor special treatment of LDCs). The Drug Arrangements were thus discriminatory and inconsistent with paragraph 2(a) and 3(c) of the Enabling Clause.[188]

Examining EC's alleged defence in Article XX(b) of GATT 1994, the panel found that the Drug Arrangements were not designed for the purpose of protecting human life and health in the EC. In addition, the necessity requirement was not fulfilled.[189] Based on the above reasoning, the panel concluded that the Drug Arrangements were in violation of both Article I:1 of GATT 1994 and the Enabling Clause, and hence the EC was violating its WTO obligations.[190]

5.4 Appellate Body findings

The panel report was appealed by the EC to the AB in the beginning of 2004. Even though the outcome of the AB's review ended up being the same as the panel's, the reasoning and interpretation backing up the decisions were different. [191] Therefore, it is justified to take a closer look at the AB's analysis. Nonetheless, it must be emphasized that the AB only reviewed the issues that were part of the appeal.[192]

5.4.1 Relationship between the Enabling Clause and GATT Article I

The AB commenced its review by establishing the relationship between the Enabling Clause and Article I:1 of GATT 1994. Like the panel, the AB found the characterization of the relationship relevant due to its implications on the burden of proof.[193] Based on the text of the Enabling Clause, the AB stated that the Enabling Clause should be treated as an exception to Article I:1 of GATT.[194] Moreover, the AB turned to the object and purpose of the

[186] *Ibid*. para 7.176, emphasis added. An example of a priori limitations is import ceilings; see Lester & Mercurio, *supra* note 13, p 802.
[187] Panel report, *supra* note 166, para 7.176.
[188] *Ibid*. para 7.177.
[189] *Ibid*. paras 7.210, 7.223.
[190] *Ibid*. para 8.1.
[191] Turksen, *supra* note 80, p 936.
[192] See the Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, 7 April 2004, WT/DS246/AB/R para 78 for a complete list of the appealed questions.
[193] *Ibid*. para 87.
[194] *Ibid*. para 90.

WTO Agreement and the Enabling Clause. The AB found that the Enabling Clause is part of the 'positive efforts' to benefit developing countries called for in the Preamble to the *WTO Agreement*.[195] The AB emphasized that the objectives of the *WTO Agreement* may well be pursued in the shape of exceptions. Many other important WTO objectives are pursued as exceptions. On this note, the AB concluded that the Enabling Clause should be treated as an exception to Article I:1 of GATT 1994. However, this was not to be interpreted as implying that the rights found in the Enabling Clause were less important than other WTO obligations. The characterization as an exception mainly had implications for the burden of proof.[196]

The AB also agreed with the panel in respect of the Enabling Clause not excluding the applicability of Article I:1 of GATT 1994.[197] Concerning the burden of proof, the AB modified the panel's findings. The AB emphasized the special status of the Enabling Clause, which implied a deviation from the normal burden of proof.[198] The AB concluded that India had to not only allege an inconsistency with Article I:1 but also had to raise the issue of the Enabling Clause in its claim. Then the EC had to prove that the Drug Arrangements satisfied the Enabling Clause, i.e. that its measures were justified under the exception.[199] The AB also found that India had fulfilled its obligation by mentioning the Enabling Clause in its written submissions.[200]

5.4.2 Meaning of "non-discrimination"

The AB continued its review by investigating whether the Drug Arrangements were justified under the Enabling Clause. The AB clarified that in order for a GSP scheme to be covered by paragraph 2(a) of the Enabling Clause, it had to fulfil the requirements in footnote 3. In other words, the AB concluded that the requirement of "generalized, non-reciprocal and non-discriminatory" mentioned in the footnote in a reference to the 1971 GSP Decision were legally binding obligations. The AB found support for its finding by comparing different language versions of the Enabling Clause. In the French and Spanish versions, the more obligatory term "as defined in" is used instead of "as described in". This provided support for the conclusion that the footnote created a legally binding obligation.[201]

The AB then turned to the interpretation of "non-discriminatory" in footnote 3 to paragraph 2(a). The parties clearly had different views on the meaning of "non-discrimination"; India arguing along the lines of formal equality

[195] *Ibid*. para 92.
[196] *Ibid*. paras 94, 98, 99.
[197] *Ibid*. para 103.
[198] *Ibid*. paras 106, 107.
[199] *Ibid*. para 118.
[200] *Ibid*. para 122.
[201] *Ibid*. paras 143, 147.

stating that all differentiation between developing countries was prohibited whereas the EC argued that differentiation was only prohibited if made on improper grounds.[202] In order to bring some clarity to the situation, the AB examined the ordinary meaning of the word "discriminate". The AB stated that both India's and EC's views of discrimination were covered by the ordinary meaning of the term.[203] The AB then concluded that the different views of the parties had one common ground, i.e. they both found differential treatment among similarly-situated beneficiaries discriminatory. However, the parties disagreed on what constituted the basis of similarly-situated.[204] The AB also referred to general international law as supporting its definition of discrimination.[205] On this note, the AB concluded from the ordinary meaning of "non-discrimination" that developed countries are required to treat *all similarly-situated* beneficiaries in an identical way.[206]

The AB then looked at the immediate context of the term "non-discrimination". In this regard, the AB noted that the requirement of "generalized" in footnote 3 needed to be understood in the context of the 1971 GSP Decision, which had intentions of eliminating the "special" preferences granted to certain designated beneficiaries. However, this historical context did not imply that identical preferences needed to be granted to all countries. Instead, the word "generalized" implied that GSP schemes needed to be generally applicable.[207]

In examining the further context of the term "non-discriminatory", the AB turned to the related paragraph 3(c) of the Enabling Clause. The AB noted that the usage of the word "shall" in paragraph 3(c) indicated that the provision implied an obligation for GSP donors to "respond positively" to the "needs of developing countries". The question was, however, how to interpret these phrases.[208]

The panel had focused its reasoning on the "needs of developing countries" on a *collective* approach, which did not allow preferences that were based on needs not commonly shared by all developing countries. The AB rejected this approach and stated that nothing in the phrasing of paragraph 3(c) supported the interpretation of the panel. The absence of an explicit condition of "all" developing countries in paragraph 3(c) supported a more general reading of the provision.[209]

In addition, the needs of developing countries had to be understood as being subject to change. In order for the preferences to "respond positively" to these possibly changing needs, they had to be understood on an *individual* basis. The Preamble to the *WTO Agreement* also supported this individual

[202] *Ibid*. paras 149, 150.
[203] *Ibid*. paras 151, 152.
[204] *Ibid*. para 153.
[205] *Ibid*. footnote 318.
[206] *Ibid*. para 154.
[207] *Ibid*. paras 155, 156.
[208] *Ibid*. paras 157, 158.
[209] *Ibid*. para 159.

view of developing needs and their changeable nature.[210] The AB summarized its view on paragraph 3(c) by describing the paragraph:

> as authorizing preference-granting countries to "respond positively" to "needs" that are *not* necessarily common or shared by all developing countries. Responding to the "needs of developing countries" may thus entail treating different developing-country beneficiaries differently.[211]

Nevertheless, the AB emphasized that the above reading of paragraph 3(c) did not mean that any kind of response was allowed to any kind of need. Paragraph 3(c) implied some limitations; first, as evident from the text, the needs had to be linked to "development, financial or trade". Moreover, the characterization of needs had to be made according to an *objective* standard. Broad-based recognition of particular needs could function as such a standard. The AB suggested the *WTO Agreement* or other multilateral instruments made by international organizations as possible sources to find support for needs.[212] Second, the phrase "respond positively" meant that the preferences must be designed to *improve* the development, financial or trade situation in the developing country. A sufficient nexus consequently had to exist between the granted preferential treatment and the need in question. In other words, to fulfil paragraph 3(c) the need had to be of such kind that it could be addressed effectively by tariff preferences.[213]

As the next step in examining the meaning of "non-discriminatory", the AB turned to the general object and purpose of the *WTO Agreement*. The AB found support, in the Preamble and the overall objectives of the *WTO Agreement,* for its interpretation of needs as not only collective but individual as well. The AB argued that the objective of promoting developing countries' increased possibilities in world trade would be better served by targeting particular needs that are only shared by sub-categories of developing countries.[214]

The AB also examined the importance of paragraph 2(d) of the Enabling Clause. The provision set up possibilities for special treatment of LDCs. The AB rejected the panel's argument that the existence of paragraph 2(d) supported an interpretation of paragraph 2(a) as prohibiting differentiation between developing countries. On the contrary, the AB pointed out that paragraph 2(d) only functioned as a means of facilitating differential treatment of LDCs even further, by implying that such treatment need not fulfil paragraph 2(a).[215]

Regarding the meaning of "non-discriminatory", the AB concluded that developed countries are not hindered by paragraph 2(a) and footnote 3 in

[210] *Ibid*. paras 160, 161.
[211] *Ibid*. para 162.
[212] *Ibid*. para 163.
[213] *Ibid*. para 164.
[214] *Ibid*. paras 168, 169.
[215] *Ibid*. paras 171, 172.

granting different tariffs to different developing countries. However, the developed countries are obliged:

> by virtue of the term "nondiscriminatory", to ensure that identical treatment is available to *all similarly-situated* GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.[216]

The question of how to interpret the term “developing countries” in paragraph 2(a) was also reviewed by the AB. The panel ruled “developing countries” meant *all* developing countries. This finding was in large part based on the panel’s reasoning on the meaning of “non-discrimination”.[217] Due to the AB’s contrasting view of “non-discrimination”, the AB also disagreed with the panel about the term “developing countries”. The AB stated that “developing countries” was not to be read as meaning *all* developing countries but could also mean less than all developing countries.[218]

5.4.3 Drug Arrangements

To conclude its review, the AB turned to the issue of whether the Drug Arrangements were consistent with the Enabling Clause. Due to the limited basis of the EC’s appeal, the AB never determined whether the Drug Arrangements fulfilled the conditions required by paragraphs 3(a) and 3(c).

Based on its earlier findings, the AB pointed out that the EC needed to show, in order to fulfil the Enabling Clause, that the preferences under the Drug Arrangements were available to all developing countries that were similarly affected by drug problems.[219] However, the AB found after a closer examination of the Drug Arrangements that the EC failed to meet this requirement. The AB gave two reasons for its evaluation. First, the beneficiaries of the Drug Arrangements were limited to the 12 countries listed in Annex I. In other words, the beneficiaries were established on a “closed list”, i.e. there was no way of including new beneficiaries except by amending the GSP Regulation. This system could not be seen as making the preferences available to all similarly-situated developing countries.[220]

Second, the GSP Regulation did not contain any standards or criteria for how the 12 beneficiaries had been selected. Therefore, the AB stated that since no standard was available, it was not possible to determine whether these were discriminatory or not.[221]

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[216] *Ibid*. para 173, emphasis added.
[217] *Ibid*. para 175.
[218] *Ibid*. paras 175, 176.
[219] *Ibid*. para 180.
[220] *Ibid*. paras 181, 182, 187.
[221] *Ibid*. para 188.

For these reasons, the AB concluded that EC had failed to prove that the Drug Arrangements met the requirement of "non-discrimination" and thereby failed to prove that the GSP programme was justified under the Enabling Clause. Consequently, the EC had violated its WTO obligations.[222]

5.5 Scholarly comments

The outcome in *EC-Tariff Preferences* case has resulted in various reactions among scholars. In this section, some of the most interesting comments from scholars will be summarized. First, scholars seem to agree in general that the *EC-Tariff Preferences* case has resulted in implications both for the understanding of the principle of non-discrimination and the concept of conditionality.[223]

Second, many scholars have criticized the reasoning in the AB decision. For example, Tomazos agrees with the reasoning of the panel and argues that nothing in the Enabling Clause supports differentiation between developing countries.[224] This is further supported with reference to the negotiation history of the Enabling Clause. He also argues that paragraph 3 of the Enabling Clause should, contrary to the view of the AB, be read as merely providing principles to guide the developed countries in how to design their GSP programmes, i.e. to function as an 'indicator' of the permissible limits of GSP design.[225] Howse, who argues that the non-discrimination obligation in the Enabling Clause is only 'aspirational', also presents similar arguments.[226] Due to their different views on the status of the Enabling Clause, these scholars logically have problems agreeing with the reasoning of the AB. In addition, there is also an economic argument stating that giving more favourable treatment to a selected group of developing countries would reduce the welfare of the ones excluded.[227]

Other scholars have questioned whether AB's definition of discrimination is consistent with previous WTO case law. Interestingly, in the *US-Shrimp* case the AB stated that discrimination could be obtained under certain circumstances even when unequal situations (and not only equal situations)

[222] *Ibid*. para 189.
[223] See e.g. Charnovitz, Steve; Bartels, Lorand; Howse, Robert; Bradley, Jane; Pauwelyn, Joost & Regan, Donald, 'The Appellate Body's GSP Decision: Internet Roundtable' (2004) 3(2) *World Trade Review* 239-265, p 240-241.
[224] Tomazos, Anastasios, (2007) 'The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds' p 306-323 in Bermann, George A. & Mavroidis, Petros C. (eds.), *WTO Law and Developing Countries*. Cambridge: Cambridge University Press, p 313-315.
[225] *Ibid*.
[226] Howse, *supra* note 99, p 393.
[227] Grossman & Sykes, *supra* note 5, p 64.

were treated differently.[228] In addition, the *EC-Asbestos* case illustrates how the AB "narrowly describe[s] WTO non-discrimination rules".[229]

Concerning the concept of conditionality the following discussion has been presented. Bartels (among others) argues that the *EC-Tariff Preferences* case implies a move from negative conditionality towards positive conditionality since the requirement of "positive response" hardly corresponds to how negative conditionality is constucted.[230] Moreover, Bartels argues that setting up conditions in GSP schemes can create situations of *de facto* discrimination. He states that even though the GSP schemes are designed to be *de jure* non-discriminatory, the conditions set up might still result in discrimination due to the fact that some developing countries may not be able to meet the conditions, e.g. on economical grounds.[231]

Further, Irish states that the AB reasoning appears to authorize conditionality.[232] Other scholars have likewise drawn the same conclusion.[233] She also explains that the requirements established by the AB (objective standard and sufficient nexus) correspond to the concepts of unilateralism and extraterritoriality, which are often mentioned as critiques of conditionality. With regard to extraterritoriality, she makes the comparison to the *US-Shrimp* case where the US was found to have territorial jurisdiction due to a sufficient nexus between the US and the migratory and endangered sea turtle species even though the animals were not restricted to specifically US waters. She points out that extraterritoriality was not explicitly dealt with in the *EC-Tariff Preferences* case, but that it might be a future problem of conditionality.[234]

Concerns have also been presented about the general effectiveness of using conditionality in trade preferences. Scholars argue that the actual impact on social values in developing countries is minimal. For example, it is a problem that labour conditions usually target export industries, although the worst workers' rights abuses occur outside of these industries.[235]

Lastly, the question about whether the EU's current GSP scheme is in conformity with WTO law is disputed. As mentioned before, the EU changed its scheme after the *EC-Tariff Preferences* case and is now claiming to have obtained WTO legality. However, many scholars argue differently. Bartels and Turksen are examples of scholars who argue that

[228] Charnovitz *et al*., *supra* note 223, p 249.
[229] *Ibid*. p 256.
[230] Bartels, *supra* note 110, p 19.
[231] Charnovitz *et al*., *supra* note 223, p 248.
[232] Irish, *supra* note 107, p 685.
[233] See, e.g. Zagel, *supra* note 84, p 150.
[234] Irish, *supra* note 107, p 689, 696-697.
[235] Harrison, James, 'Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform' (2005) 42(6) *Common Market Law Review* 1663-1689, p 1685-1686.

EU's GSP+ is in violation of the WTO law.[236] Bartels argues that the EU's GSP+ violates the Enabling Clause for the following reasons. First, Bartels questions the requirement of ratification and implementation of the listed international conventions in the GSP+. He argues that having these conventions as a basis for granting tariff preferences is not a good way to determine relevant needs. In addition, he points out that giving importance to the act of ratifying is not the same as what the AB meant by referring to conventions as evidence of objective standards.[237] He also questions whether the selective needs chosen by the EU really correspond to actual needs in the developing countries and if there is a sufficient causal link. Consequently, he argues that the EU is compensating countries for 'developing needs' that do not exist in practice.[238] Furthermore, Bartels is also critical towards the vulnerability criterion and whether this is a relevant criterion for discriminating between developing countries. Bartels also comments on the fact that the large costs caused by the requirement for developing countries to ratify and implement the conventions creates a paradox where developing countries have to invest large amounts of money to get some benefits in return. To resolve this, Bartels advocates the adoption of a grace period.[239] Using similar arguments, Turksen also concludes that the EU's GSP+ is to be regarded as discriminatory and not in conformity with WTO law.[240]

[236] For comments about the effect of the case on the US GSP system, see e.g. Moss, Kevin, 'The Consequences of the WTO Appellate Body Decision in *EC-Tariff Preferences* for the African Growth Opportunity Act and Sub-Saharan Africa' (2006) 38(3) *New York University Journal of International Law and Politics* 665-706 and Howse, *supra* note 99.
[237] Bartels, Lorand, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10(4) *Journal of International Economic Law* 869-886, p 874-877.
[238] *Ibid*. p 878-880.
[239] *Ibid*. p 881-882.
[240] Turksen, *supra* note 80, p 941-966.

6 Analysis

This Chapter will be divided into three different parts; first, an analysis of the principle of non-discrimination, a second part turning to the concept of conditionality, and a final section which analyzes possible implications of the results.

6.1 Principle of non-discrimination

When analyzing the principle of non-discrimination in trade preferences in the context of the *EC-Tariff Preferences* case, there are two important questions to discuss: (1) whether the non-discrimination obligation in the Enabling Clause is binding on developed countries; and (2) the scope of the non-discrimination obligation.

As stated previously, the obligation of non-discrimination is found in footnote 3 to paragraph 2(a) of the Enabling Clause. In the *EC-Tariff Preferences* case, both the panel and the AB concluded that the obligation was *binding* to developed countries. However, they supported this conclusion in slightly different ways; the panel referred to the negotiation history and the AB by examining various language versions. By establishing a binding obligation, the panel and the AB clearly wanted to emphasize the importance of the GSP programmes being under the scrutiny of the dispute settlement system and subject to an enforceable non-discrimination requirement. With reference to the negotiation history and the context of the footnote 3, it is reasonable to assume that the drafters intended footnote 3 to constitute a binding obligation.

When examining the principle of non-discrimination, references to the principle in other parts of the WTO law are valuable. The principle of non-discrimination found in the MFN obligation and in Article XX of GATT 1994 both provide direction on how to evaluate non-discrimination. The MFN obligation, on the one hand, mentions ‘like products’ as being the appropriate comparator. Article XX of GATT 1994, on the other hand, qualifies discrimination as having to be ‘arbitrary’ or ‘unjustified’ to be unlawful. In this respect, the Enabling Clause interestingly differs from the rest of the WTO law. In footnote 3 to paragraph 2(a), no indication has been made of what is required in order to fulfil the obligation of non-discrimination. This gave the panel and the AB a great amount of freedom in the *EC-Tariff Preferences* case and their interpretation of non-discrimination can therefore be regarded as important for the understanding of WTO non-discrimination in general.

When comparing the reasoning of the panel and the AB, it is clear that the two did have different views on the meaning of discrimination. Starting with the panel, it concluded that *identical* treatment should be provided to *all*

developing countries (with the exception of LDCs). In other words, the panel's view on discrimination can be categorized as exceptionally strict since it appears not to allow *any* differentiation among developing countries. Such interpretation of non-discrimination would have immense consequences on the design of the current GSP schemes. If differentiation were not allowed, it can be argued that both the EU's and other countries' GSP schemes would constitute violations of WTO law. Such a situation would reasonably make the future of the entire tradition of GSPs rather uncertain.

The AB, in contrast, argued that the non-discrimination principle implied an obligation to treat *all similarly-situated* developing countries identically. The approach chosen by the AB could be categorized as less strict than the panel's. In other words, the reasoning of the AB allows for a higher degree of differentiation among developing countries.

In my view, the AB's approach to the meaning of discrimination corresponds in large part to what is meant by discrimination in every-day language and in other disciplines. To argue that not any differentiation is allowed, even if the countries are in different situations, would be a deviation from the ordinary meaning of discrimination. To go as far as the AB seems to do in the *US*-Shrimp case and argue that treating different situations differently is enough to find discrimination is to make the scope of the principle of non-discrimination too broad. This is also supported by the fact that, in e.g. Article XX of GATT 1994, the treatment causing the alleged discrimination has to meet a certain level in order to be regarded as discriminatory.

An important reason for the different conclusions regarding non-discrimination is the different interpretations of the ambiguous language of paragraph 3(c) of the Enabling Clause made by the panel and the AB. While the panel presumed a collective approach to the evaluation of development needs, the AB did the opposite and advocated an individual approach. The AB concluded that development needs do not need to be shared by all developing countries but can instead be different for different subgroups. The AB further established two conditions set up in paragraph 3(c): (1) that the needs are related to "development, financial or trade" according to an objective standard, and (2) that there is a sufficient nexus between the preferential treatment and the need, in order for the former to effectively improve the latter.

By establishing these requirements, the AB contributed to setting up a frame of the permissible discretion for developed countries in their design of trade preferences. However, this framework is by no means complete. The AB left important issues unanswered, both because of the nature of the conflict at hand and presumably also because of the political sensitivity existent in these questions. First, the AB never clarified the limits of what is meant by a "need". Evidently, the wording in paragraph 3(c) specifies that is has to be linked to "development, financial or trade". These are nonetheless all very

broad terms, which could fit almost any "need". Especially "development" must be regarded as a term with many possible definitions. In addition, the AB did not discuss developed countries' discretion in deciding what needs to be targeted in their GSP schemes.

When discussing the difficulty of classifying a "need", it is interesting to look closer at the Drug Arrangements. Since the AB only had the mandate to interpret paragraph 3 of the Enabling Clause as a means of understanding the content of paragraph 2(a), the AB never determined if the Drug Arrangements actually fulfilled the requirements of paragraph 3. The AB therefore never elaborated on whether the EU's goal of fighting drug problems corresponded to a legitimate need. Nevertheless, the link between drug problems and development seems supported. The problematic part of the Drug Arrangements is instead the issue of whether trade preferences could have been seen to constitute a positive response to the drug problems. In order to respond positively to the development need and thereby be in accordance with the Enabling Clause, the trade preference had to improve the drug problems effectively. In my view, it is rather uncertain whether this would actually be the case and therefore it is rather unlikely that the Drug Arrangements would have been approved in a review by the WTO dispute settlement system.

Closely linked to these issues is the question of whether an objective standard of needs, as advocated by the AB, is obtainable. This is yet another issue that the panel and the AB had different views on. The panel argued that an objective standard is not possible and consequently that differentiation among developing countries would lead to the collapse of the GSP systems. The AB, on the other hand, referred to the *WTO Agreement* and various multilateral instruments as the source of such an objective standard. It can be noted that this scarce explanation is the only clarification the AB makes about the introduced objective standard. Even though the panel is taking the argument too far by threatening with the collapse of the GSP systems, it has a point in problematizing the practical difficulties. Certainly, there will be difficulties differentiating objective standards from disguised objective standards that in practice promote "subjective" needs.

What is interesting to discuss is what the relevant subject of comparator is among developing countries. Interestingly, the AB made a distinction between the 'similarly-situated' analysis in itself and the basis of determining 'similarly-situated'. The AB stated that both India and the EC agreed with the 'similarly-situated' analysis. However, regarding the basis of 'similarly-situated', India argued that all developing countries were in the same situation whereas the EC argued that only the developing countries with similar development needs were in the same situation. Since there are so many developing countries among the WTO members, it would be unreasonable to argue that this large group of countries should be treated as "the same". In the group of developing countries there are varying development levels and development needs. The differences within the

group of developing countries are so extensive that arguably it would be absurd not to employ the individual approach advocated by the AB.

Accordingly, the reasoning by the panel stating that the expression "developing countries" includes all developing countries is problematic. In concluding the reverse, the AB used the absence of an explicit reference to "all" developing countries in the text as an argument supporting its opinion. However, this kind of argument is difficult because it could easily show the opposite view; if the drafters really wanted to differentiate between developing countries, they would have done so explicitly. Despite this argumentation flaw, the arguments put forward by the AB are much more persuasive than for example Tomazos' argument.

One way to describe the AB reasoning is to label it as a "middle way", where the AB compromised between the different interests of developed and developing countries. On the one hand, it can be argued that the AB took great consideration of the special situation of the developing countries and that by introducing the objective standard it was trying to protect the interests of developing countries. On the other hand, it can be argued that the AB reasoning is a setback for developing countries in the sense that the developed countries still keep a great amount of discretion of the GSP design in practice. It must also be kept in mind that the GSP schemes are voluntary and that a reduction of the developed countries' discretion would likely jeopardize the existence of GSP schemes.

6.2 Conditionality

The *EC-Tariff Preferences* case also implies interesting understandings of the concept of conditionality. Even though the panel and the AB never explicitly discussed the possibility of developed countries using conditionality, the question was indirectly targeted through the principle of non-discrimination. Conditionality creates differentiation among developing countries and consequently developed countries must follow the requirements set out by this principle when designing GSPs with conditions.

The reasoning of the panel implied a rejection of the concept of conditionality in the sense that the panel did not allow for any differentiation. In contrast, the reasoning of the AB created a possible framework for conditionality. At least, the AB created the possibility of designing GSPs that would differentiate between beneficiaries and presumably, to be made based on various conditions set up by the grantor country for the potential beneficiaries to fulfil. The question is, however, in addition, whether the concept of conditionality is consistent with the principle of non-reciprocity. It could be argued that the two different concepts are not compatible since the potential beneficiaries make corresponding concessions by fulfilling the conditions. In addition, the fact that only some parts of the Enabling Clause were discussed in the case contributes to uncertainty about the outcome of other cases. As a result, the

exact scope of the concept of conditionality is not clear from the case and at present not yet determined.

It seems natural to agree with Bartels' comment on the *EC-Tariff Preferences* case implying a shift from negative conditionality to positive conditionality. Since one of the requirements of the principle of non-discrimination is that the trade preference must be a *positive* response to the targeted need of the developing country, it is difficult to argue that one can use negative conditionality to accomplish this. This is because of the mere fact that negative conditionality means that benefits are *not* granted due to certain reasons compared to positive conditionality where benefits are *positively* granted.

With reference to the argument presented by Irish, it is important not to forget about the potential problem of extraterritoriality. However, in my view, the risk of extraterritoriality posing a future risk to conditionality is not as present compared to other trade measures. The special character of GSPs as being voluntary makes it easier for developed countries to avoid these types of problems when justifying their schemes.

The remaining question now is to what extent the developed countries will use the possibility of conditionality in order to influence important changes in developing countries. At a minimum, one can note that the possibility for increasing the link between trade and social values like human rights exists. However, it is up to the developed countries to use it wisely. Perhaps in the future, conditionality can give social values the self-evident place within the field of international trade law that they deserve.

6.3 Implications

As previously discussed, the AB's ruling in the *EC-Tariff Preferences* case provided developed countries with the discretion to choose beneficiaries, while limiting their freedom in some respects. One possible consequence of the permissible discretion of differentiating between countries is that developed countries might fall back into old trade patterns from the colonial era. It has been observed that donor countries usually have a tendency to give more generous trade benefits to countries where they already have strong historical ties. The question is now if such a tendency will risk getting even stronger due to the *EC-Tariff Preferences* case. It appears that the EU tries strenuously to design its GSP scheme in a way to benefit the developing countries of its choice.

Another interesting trend within the EU is the development of an increasing number of EPAs. One possible explanation for the EU choosing this new approach to trade with developing countries might be the setback experienced in the *EC-Tariff Preferences* case. The EU's desire, to a greater extent, be able to set the terms and standards of trade cooperation and to

avoid the constant threat of its GSP scheme being legally challenged, can be assumed to be some reasons for the EU's new attitude.

The EPA development might seem to indicate a shift from non-reciprocity towards reciprocity concerning trade with developing countries in the future. Such a shift, would of course be part of a longer-term perspective since the developing countries in most EPAs enjoy liberalization exceptions. In any case, it is interesting to discuss what a reciprocity shift would implicate. It can be argued that the EPAs will create a greater amount of certainty for developing countries. The GSP schemes are often based on short-term mandates and set for a certain period of time e.g. two years. This can create situations where developing countries invest large sums of money to fulfil the conditions of a certain GSP programme to possibly later experience that the conditions have been changed. In this regard, a greater amount of reciprocity would produce greater certainty. However, this is only one of many consequences that can be predicted.

Most observers, including myself, agree on the fact that EU's current GSP system is not completely in conformity with WTO law. Since the EU, instead of making changes in order to achieve WTO conformity, has chosen to elaborate EPAs, it is reasonable to assume that the EPA development is a sign of the EU trying to circumvent its WTO obligations. Consequently, it is interesting to discuss whether the AB reasoning in *EC-Tariff Preferences* case has resulted in a situation where developed countries abandon their GSP programmes. Is the world trade community now experiencing a movement away from GSP programmes? It may be too early to answer this question with any certainty. What is clear is that, the EU in its engagement in EPAs, at least has taken a step away from GSP programmes.

By linking to the general problem that was presented in the introduction, the last part of this analysis will discuss how the different interests of developing and developed countries are balanced in these understandings of non-discrimination and conditionality and in the current developments in world trade law.

First, it can be argued that by allowing GSP donors to differentiate among developing countries the WTO is thereby serving the interests of developed countries. However, by articulating necessary conditions for this differentiation, the dispute settlement system cannot only be described as favouring the developed countries. The *EC-Tariff Preferences* ruling has limited the total freedom of developed countries in a way that can only be described as a compromise. It can be argued that the AB, in contrast to the panel, was more sensitive to the political reality of the GSP programmes. It might also be argued that the development of EPAs might increase such politically biased influences in world trade law that the *EC-Tariff Preferences* case was trying to put a stop to. Whether this is desirable or not can be debated, although the fact that international law and politics are closely linked cannot be denied.

Second, the meaning of this current development for developing countries can be discussed. It can be argued that if it is true, as many critics argue, that developing countries are badly served by GSP programmes, then the current development of EPAs may serve as an improvement to these countries' situations. Yet, if the developing countries will show to have difficulties in claiming their interests in the EPA negotiations because of their weaker and more vulnerable position, this alternative is not desirable from the perspective of the developing countries. As with all trade collaboration, the risk of protectionism is always an issue. Countries might have hidden agendas, protecting their own market and other underlying interests.

Without any clear answers as to what will happen in the future, we can only wait eagerly for the next interesting case to be litigated in the WTO dispute settlement system. Hopefully, the upcoming case law will bring clarity to the issues remaining unanswered after the *EC-Tariff Preferences* case.

7 Conclusion

As shown in this thesis, trade preferences for developing countries are certainly a complicated issue. Regardless of diverging opinions on trade preferences, most people would agree on the importance of taking on the challenge and making the world trade arena a better place for developing countries. Unfortunately, Santos *et al*. pinpoint the underlying difficulties of the matter when they state that "[h]istory, however, does not allow us to be 'development optimistic'."[241]

The principle of non-discrimination in trade preferences allows donor countries to differentiate between developing countries, with certain limitations. The *EC-Tariff Preferences* case has established that it is not discriminatory to design differentiating trade preferences as long as they treat all similarly-situated countries identically. Deciding which countries are similarly-situated is done on the basis of development, financial and trade needs. The *EC-Tariff Preferences* case also ascertains that developed countries have to abide by the following conditions when designing their GSP programmes in order to be in conformity with the Enabling Clause. In order not to discriminate between developing countries, developed countries must: (1) base differentiation on needs that are related to "development, financial or trade" according to an objective standard, and (2) ascertain a sufficient nexus between the preferential treatment and the need, in order for the former to effectively improve the latter.

The *EC-Tariff Preferences* case has also brought some clarity to the concept of conditionality. Since the usage of conditions creates differentiation between different developing countries, the requirements set up by the principle of non-discrimination must be followed in order for conditionality to be in conformity with WTO law. Today, the questions about the legality of conditionality are not entirely settled. However, most indications, including the reasoning of the *EC-Tariff Preferences* case, point in the direction of conditionality being within the framework of WTO law. It also seems like positive conditionality has a greater chance of surviving WTO scrutiny than negative conditionality. Future case law will certainly bring more clarity to the limits of both conditionality and the principle of non-discrimination.

On a final note, some possible openings for future research will be presented. Since international trade law has come to enjoy only a limited space in Swedish academia, additional research in this field would be welcomed. Based on the findings of this thesis, appropriate topics would be to examine how the increased focus on PTAs/EPAs will affect developing countries' situation in world trade, and if there would be problems with WTO conformity or if the development of EU's GSP scheme is also present in GSP schemes of other countries.

[241] Santos *et al*., *supra* note 85, p 665.

Supplement A

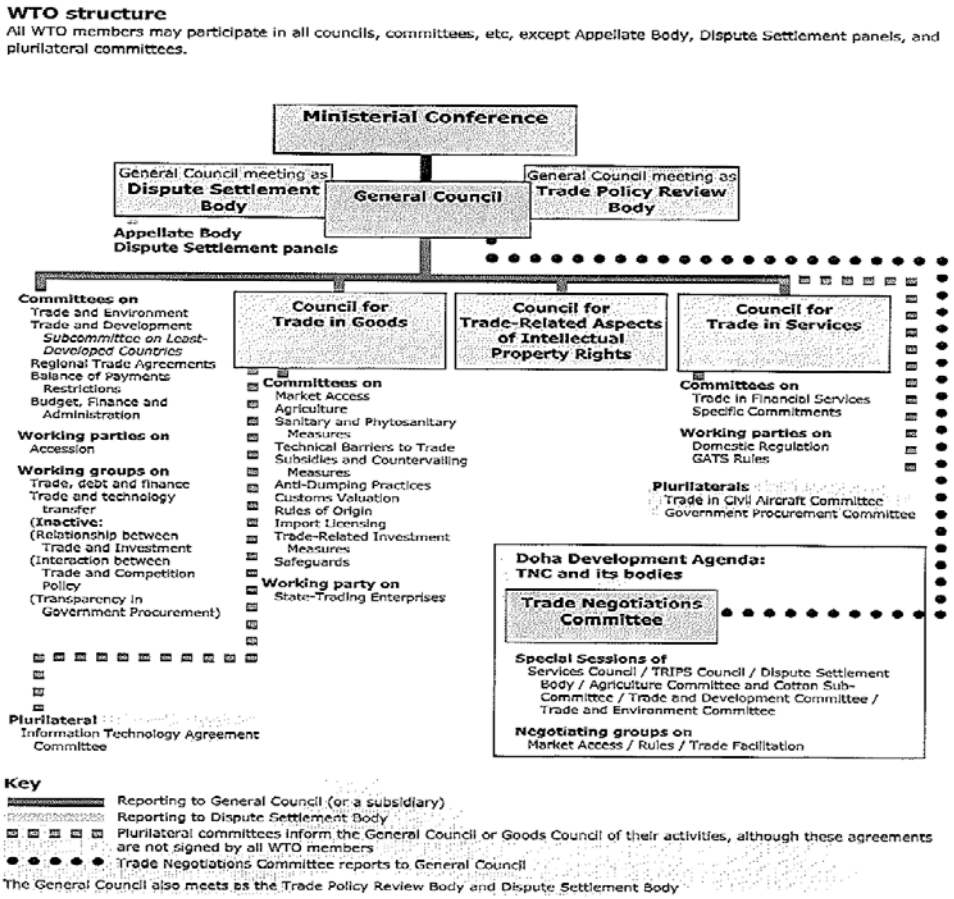

Figure 1: Structure of the WTO

Source: WTO, 'WTO Organization Chart', available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf (visited 1 February 2011).

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